

Thane D. Somerville WSBA #31468 *pro hac vice*
Thomas P. Schlosser WSBA #06276 *pro hac vice*
MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE
811 First Avenue, Suite 218
Seattle, WA 98104
Tel: 206-386-5200
Fax: 206-386-7322
t.somerville@msaj.com
t.schlosser@msaj.com
Attorneys for Plaintiff Hoopa Valley Tribe

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

HOOPA VALLEY TRIBE,) Civ. No. 1:20-cv-1814-JLT-EPG
Plaintiff,)
v.)
UNITED STATES BUREAU OF) SECOND DECLARATION OF
RECLAMATION; DEBRA ANNE HAALAND,) MICHAEL ORCUTT IN SUPPORT
in her official capacity as Secretary of the) OF PLAINTIFF'S MOTION FOR
Interior; MARIA CAMILLE CALIMLIM) PRELIMINARY INJUNCTION
TOUTON, in her official capacity as)
Commissioner of the United States Bureau of) Date: January 20, 2023
Reclamation; ERNEST A. CONANT, in his) Time: 9:00 AM
official capacity as United States Bureau of) Courtroom: 4 – 7th floor, Fresno
Reclamation California-Great Basin Regional) Hon. Jennifer L. Thurston
Director; and UNITED STATES)
DEPARTMENT OF THE INTERIOR)
Defendants.)

1 I, Michael Orcutt state and declare as follows:

2 1. I am a fisheries biologist and an enrolled member of the Hoopa Valley Tribe
3 (Tribe). I am presently employed by the Tribe, located on the Hoopa Valley Indian Reservation
4 in Northern California, where I continue my tenure of over 35 years as Director of the Fisheries
5 Department.

6 2. In my work with the Hoopa Valley Tribe Fisheries Department, and in my role as
7 Fisheries Director, I am intimately involved and have substantial personal knowledge of fisheries
8 management issues in the Trinity River Basin, including operations of the Trinity River
9 Restoration Program (TRRP) and Trinity Management Council (TMC), and implementation of
10 the 2000 Trinity River Record of Decision (ROD). My professional duties include representing
11 the Hoopa Valley Tribe before state and federal agencies and the U.S. Congress in matters
12 involving restoration of the Trinity River fishery. I also have fished and hunted on the Hoopa
13 Valley Reservation for most of my life and I have witnessed the devastation that the Trinity
14 River Division of the CVP has had on the fishery resources that the Hupa People have depended
15 upon since time immemorial.

16 3. I submitted a declaration in this proceeding on December 16, 2022 (filed at Dkt.
17 #109), which remains true and correct and which I incorporate herein by reference. I submit this
18 second declaration in response to issues raised in Defendants' response pleadings.

19 4. The Trinity River Flow Study, upon which the flow schedule in the Trinity River
20 ROD is based, is a holistic and comprehensive evaluation of the actions necessary to restore fish
21 in the Trinity River, which was based on decades of scientific review, and which remains the
22 best available comprehensive science regarding fishery restoration flows in the Trinity River.

23 5. Specifically, Chapter 8 of the Trinity River Flow Study (which has been provided
24 to the Court in Dkt. #111-3) explains that the flows recommended in that document and
25 approved in the ROD were carefully designed to meet multiple inter-related management
26 objectives. The Flow Study allocated the limited available amount of water pursuant to a day-

1 by-day flow schedule to achieve management objectives and to ensure that those objectives were
2 met at all times of the year.

3 6. Chapter 8 of the Flow Study contains tables that explain the specific management
4 targets, flow purposes, and flow benefits for recommended flows at each day of the year and for
5 each type of water year. The Flow Study is a carefully balanced analysis designed to maximize
6 benefits with available water at all times of year for different fish species and their life history
7 requirements.

8 7. The Defendants' proposed re-direction of 60,000 – 220,000 acre-feet of water
9 from assigned purposes in Spring/Summer months will significantly disrupt and undermine the
10 holistic benefits of the flows called for in the Flow Study and approved in the ROD.

11 8. In contrast to the Trinity River Flow Study, the WFV Project fails to provide a
12 similarly comprehensive approach and fails to completely evaluate how such flow modifications
13 could result in adverse effects to the Trinity River fishery if full amounts of water called for by
14 the ROD are not available in Spring/Summer.

15 9. Removing significant amounts of water in Spring/Summer will likely impair
16 temperature criteria in warmer months, which will impair water quality and harm fish species.
17 As one example, spring Chinook adults mature and reside in the river from May to September so
18 they will suffer from having less water, and correspondingly warmer water temperatures, in
19 summer months. A comprehensive analysis is necessary to ensure that unintended consequences
20 do not occur to the detriment of all species of anadromous fish in the Trinity River.

21 10. The temperature impacts from the WFV Project, and associated water quality
22 impacts, may cause violations of water quality standards under the Clean Water Act. The Hoopa
23 Valley Tribe has adopted the temperature standards from the 2000 ROD in its Clean Water Act
24 water quality control plan for the mainstem Trinity River (Hoopa Valley Tribe, Water Quality
25 Control Plan, Hoopa Valley Indian Reservation, Approved by EPA, 2002 (amendments approved
26

1 May 2020)). These standards were designed and put in place to be protective of salmonid
2 species and other ecological resources in the Trinity River.

3 11. Defendants claim that the WVF Project will benefit geomorphology and provide
4 related benefits to growth and outmigration of juvenile fish, but geomorphology benefits are hard
5 to determine. The associated benefits to growth and migration of fish are even harder to
6 determine. And trying to define and assess any such benefits in a meaningful way after one-year
7 of changes to flows is certainly impossible. Any attempt to reach a meaningful conclusion about
8 the benefits of flow alterations on the basis of a one-year deviation from those established in the
9 ROD cannot satisfy CVPIA section 3406(b)(23)'s "best available scientific data" standard on
10 which Hoopa and the Secretary concurred in the 2000 ROD.

11 12. In addition, it is premature to consider approval of substantial modifications or
12 revisions to the flow schedule provided in the ROD. For one reason, the work intended to be
13 performed by the Trinity River Restoration Program (TRRP) is far from complete. Many habitat
14 restoration and rehabilitation projects remain unfinished. This is due in part to inadequate and
15 declining federal funding of the program as well as the Interior Department's failure to meet its
16 legal obligations related to Trinity River restoration as required by Congress.

17 13. Also, although the Trinity River ROD was executed in 2000 by the Secretary of
18 the Interior and Hoopa's Chairman, implementation of flows did not begin until 2005 due to
19 litigation filed by water and power contractors. As a result, the period of record of
20 implementation of ROD flows is relatively limited, providing an inadequate timeframe to assess
21 the success or failure of the ROD flows. The effectiveness of such flows to achieve their goals
22 has been adversely affected by the delays and failures in completing anticipated restoration.

23 14. As noted in paragraph 14 of my prior declaration, there is currently an ongoing
24 and unfinished effort by the TRRP staff to complete the so-called "synthesis reports" to evaluate
25 TRRP performance. While those reports could be used to form the basis for a holistic evaluation
26 and future recommendations, that work has not yet been completed.

1 15. If the WFV Project proceeds, fishery managers and scientists will also be
2 deprived of a year of data from implementation of the ROD as it was intended, which will further
3 impair our ability to understand how the ROD is working to benefit fish populations and other
4 ecological benefits.

5 16. To my knowledge, the Defendants have not completed review under NEPA nor
6 consultation under the Endangered Species Act regarding the WFV proposal even though there
7 are ESA-listed species in the Trinity River that could be affected by the WFV Project proposal.
8 The failure to engage in this environmental review increases the risk of unintended consequences
9 and provides an additional basis to enjoin the implementation of the Project.

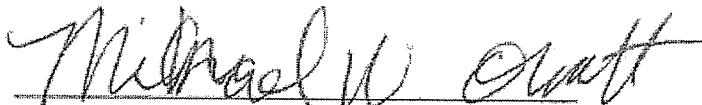
10 17. The WFV Project cannot be properly characterized as a mere refinement or
11 adjustment to the flow schedule; rather, it is a wholesale re-allocation of ROD flows and a
12 revision of the ROD itself. The WFV Project, as proposed, would re-allocate up to 27% of total
13 annual ROD volumes, release that water for different purposes (other than called for in the ROD)
14 in an entirely different time of year (and before the water year is known), and then deprive fish
15 of that water in Spring/Summer months when it is needed to achieve biological objectives called
16 for in the Trinity River Flow Study and the ROD.

17 18. The government's contention that there will be sufficient water to achieve ROD
18 goals in Spring/Summer despite removing 60,000 – 220,000 acre-feet from that time period
19 defies logic and is not supported by scientific analysis in the government's documents. There is
20 no explanation as to what will happen if fish are suffering unanticipated or unintended
21 consequences from depriving the river of flows called for by the ROD in Spring/Summer. Once
22 that water is released down the river in the winter months, it is gone and not available for use
23 later in the water year.

24 19. Based on my personal knowledge, experience, and statements described above
25 and the statements made in my first declaration, I maintain my position that the WFV Project
26 will result in irreparable harm to the Trinity River fishery and thus to the Hoopa Valley Tribe.

1 I declare under penalty of perjury under the laws of the United States of America that the
2 foregoing statements are true and correct.

3 DATED this 9th day of January, 2023.

4 
5

6 Michael W. Orcutt, Fisheries Department Director
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

SECOND DECLARATION OF MICHAEL ORCUTT RE
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION - 6

CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to the attorneys of record.

/s/ Thane D. Somerville
Thane D. Somerville